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No. 84-1158, Misc.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1984

VICKIE SINGER, et al.,

Petitioner,

vs.

ROBERT WADMAN, et al.,

Respondents.

VICKIE SINGER, et al.,

Petitioners,

vs.

WALTER D. TALBOT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Brief in Opposition to the Petition for Writ of Certiorari is filed on behalf of Respondents Matheson, Wadman, Lunnen, Reid and Riggs.

Petitioner, Vickie Singer, seeks a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, seeking review of that Court's affirmance of a Judgment of the District Court for the Central District of Utah.

The opinion of the United States District Court for the District of Utah is reported at 595 F. Supp. 188 (D.C. Utah 1982), and the decision of the Tenth Circuit is reported at 745 F.2d 606 (10th Cir. 1984).

References herein will be to the decision of the District Court (as above Reported and as set forth in Petitioner's Supplemental Appendix), to the decision of the Court of Appeals (as

above Reported and as set forth in the Appendix to Petition), to the petitioner's Brief in the Court of Appeals, and to the record on appeal (ROA) in the Court of Appeals.

STATEMENT OF FACTS

The operative facts, as distilled from the District Court's Memorandum Decision are:

1. In 1973, Petitioner's decedent, John Singer, removed his children from the public schools in Summit County, Utah, in violation of the Utah compulsory education statutes. The School District attempted to accommodate the Singers by allowing them to teach their children at home, subject to some supervision and monitoring. The Singers, allegedly because of religious conviction, refused to compromise.

2. After the School District's attempts to compromise failed, the matter was referred to the Summit County Attorney, who in turn referred it to the State Juvenile Court. From 1974 to 1978, four separate Juvenile Court Judges became involved. The Singers attended some of the initial court hearings, but later refused to attend court, rejected offers of free legal assistance, declined to assert their alleged constitutional claims, and refused to appeal.

3. Eventually, several court orders and warrants for the arrest of the Singers were issued, the responsibility for the enforcement thereof falling upon the Summit County Sheriff, Ron Robinson.

4. When Sheriff Robinson attempted to enforce the court orders and warrants, Petitioners warned him that they

would never peaceably submit to arrest. In the fall of 1978, Sheriff Robinson asked Respondent Larry Lunnen for assistance.[1]

5. Commissioner Lunnen agreed that the Department of Public Safety should assist Sheriff Robinson in view of the unique difficulties of the situation and the limited resources of the Sheriff's Office. Several meetings were held in late 1978, wherein Wadman developed the first arrest plan, referred to herein as the "October attempt." The essence of that plan was that Wadman and two other

---

[1] Respondent Lunnen was the Commissioner of the Department of Public Safety, charged with statewide law enforcement responsibility. Under him were Respondent Wadman, the Director of the Division of Narcotic and Liquor Law Enforcement (NLLED), and Respondent Reid, the Superintendent of the Utah Highway Patrol. Defendant Matheson was the Governor and the Chief Executive Officer of the State of Utah. These Respondents will be referred to herein collectively as the "state officials."

agents of NLLED would pose as newspaper reporters and attempt to arrest Mr. Singer while he was out of the presence of the other family members. That plan was attempted in October 1978, but failed when John Singer wrestled free, pulled a pistol, ordered the three officers off of his property, and threatened to "blow their heads off" if they tried again to arrest him. He was assisted by several family members, including the Petitioner herself, who jumped on, pummelled, and assaulted the three officers.

6. Later in 1978, as the result of John Singer's purporting to marry himself to a second wife, Shirley Black, her husband, Dean Black, obtained a court order requiring Sheriff Robinson to retrieve the Black children from the Singer "compound," an isolated group of buildings in rural Summit County. In addition, a felony arrest warrant was

issued for John Singer as a result of his threatening the officers with a pistol during the "October attempt."

7. In late 1978 and early 1979, additional planning sessions were held, wherein alternative plans were considered for the execution of the various court orders and arrest warrants; each order and warrant had been issued by a court of competent jurisdiction, and was valid.

8. Eventually, a plan was devised whereby ten officers on snowmobiles would approach and arrest John Singer at a time when he was away from the "compound" and the other family members. The plan assumed that John Singer was rational and would submit to arrest when confronted with an overwhelming show of force. None of the "state officials" were present when the second arrest was attempted on January 18, 1979. The

arresting officers, consisting of members of the Highway Patrol, agents of the NLLED, and several Sheriff's deputies, confronted Mr. Singer and told him that he was under arrest. Mr. Singer pulled a loaded pistol and leveled it at Agent Jolley and shut one eye. Appearing to have the ability and intent to fire, he was shot by Jolley in self defense.

9. Thereafter, an investigation of the incident was undertaken by the Summit County Attorney's Office, the State Department of Public Safety, and the Federal Bureau of Investigation. The shooting was found to be justified.

10. In April 1980, Petitioner filed her Complaint in the United States District Court for the District of Utah, charging a variety of claims brought pursuant to 42 U.S.C. § 1983. Extensive discovery was completed, the parties

taking more than seventy depositions. In September 1982 the District Court, concluding that there were no material issues of fact and that Petitioner's claims failed both legally and factually, granted Respondents' Motions for Summary Judgment. In September 1984, the United States Court of Appeals for the Tenth Circuit affirmed, and Petitioner now seeks a Writ of Certiorari from this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because:

First, the Petition is an argumentative and inaccurate assertion of "facts," not as established by the Record, but rather as Petitioner perceives them, or wishes they were;

Second, the Petitioner again fails to satisfy the threshold requirement of any § 1983 action: to identify what established constitutional right was violated, and how it was violated;

Third, the Petition in essence is little more than a personal attack on the Respondents, the District Court, and the Court of Appeals, asking that this Court assume bias, neglect or incompetence on the part of the lower Courts, and to indulge in a presumption of irregularity;

Fourth, the Petition sets forth no valid reason why this Court should grant the Writ of Certiorari and scrutinize the legal and factual issues already fully considered and decided by the District Court and the Court of Appeals.

I

THE PETITIONER'S FACTUAL ASSERTIONS ARE UNSUPPORTED BY, OR CONTRARY TO, THE FACTS ESTABLISHED IN THE RECORD

The Petition not only asks this Court to assume either corruption or incompetence, or both, on the part of the District Court and the Court of Appeals, but regrettably persists in a course of conduct consistently engaged in by the Petitioner below: the misleading and argumentative assertion of alleged "facts" which are often demonstrably false. The following may serve to illustrate Petitioner's propensity for imaginative and unsupported factual assertions:

A. The Petition claims that "every official involved with the Singer case, including the federal district judge, was a member of the dominant church . . .", and intimates that all such

officials were agents of the great "Church-State" power structure which masterminded the persecution of Petitioners (Petition, pp. 3, 6, 7, 9, 14, 15).

Nothing in the Record, however, in any way supports the existence of a massive "Church-State" conspiracy.[2]

---

[2] In Petitioner's Brief to the Tenth Circuit, one of the references to the record in support of the "Church-State conspiracy" was to the deposition of John Singer's brother, Harald. The following dialog is illustrative of the quality of Petitioner's evidence of a "conspiracy":

> Q. Do you think there was a conspiracy between the egomaniac [Wadman] that you referred to, the Governor, the Attorney General, the LDS Church, and the School Board?
>
> A. I have no idea on these. I have no evidence to that effect. If there was, you would have to talk to Spence [Petitioner's counsel of record] . . . (ROA, Vol. XLI (41), p. 244).

It is also untrue that "every official" was a member of the dominant church. While some of the participants were members of the LDS Church, some were inactive, i.e., Wadman (ROA, Vol. LV (55), pp. 21-23), had been excommunicated therefrom, i.e., Jolley, the officer who shot John Singer (ROA, Vol. XVIII (43), pp. 64-65), and as to some, there was simply no evidence of their religious affiliation, i.e., Superintendent Reid and NLLED agents Riggs and Fullmer. Furthermore, there was no evidence that any of the participants' actions were in any way motivated, shaped, or directed by their religious affiliation or lack thereof.

B. The Petition complains that the Respondents sought, from a state judge, the "deletion of language from the arrest order that had previously required officers to conduct arrest attempts in such a way as not to do

bodily harm to the Singers," that the language was in fact deleted, and "the officers were free to use whatever force was necessary, including deadly force" (Petition p. 6).

First, there is no evidence that any of the state officials were in any way involved in that proceeding. More importantly, the removal of such language was simply legally irrelevant. The language originally contained in the warrant merely required any arrest to be accomplished in a manner that protected human life, which constraint is legally implicit in any arrest warrant, regardless of the specific language.[3] See

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[3] Petitioner also complains that some defendants allegedly had ex parte contacts with one of the state judges. In view of the fact that the Singers refused to appear in court, or to otherwise pursue their claims through the judicial system, this complaint is difficult to comprehend; obviously no contact at all could be had with the court unless it was ex parte.

District Court discussion of the matter at 595 F. Supp 218; Supp. App. pp. 41-42.

C. The Petition asserts that the "officers" and/or "defendants" (plural) described the January arrest plan as stupid and dangerous (Petition at pp. 7, 8, 12). On the contrary, only <u>one</u> of the defendants so characterized the arrest plan.

The January arrest plan was to confront John Singer with a large number of armed officers while he was some distance away from his home. The theory was, simply, that Singer was a rational human being who would submit when confronted with an overwhelming show of force. The Respondents who devised the arrest plan assumed that John Singer was reasonable and prudent. The one officer, Ron Gunderson, who testified that he thought the plan was dangerous was also the <u>only</u> person involved who

did not think (prior to the arrest attempt) that John Singer was either reasonable or prudent. His personal opinion was that the plan was dangerous because he did not believe that Mr. Singer would surrender, and that the plan would force a confrontation with the likelihood of either Mr. Singer or one of the officers being injured. He admitted that if Mr. Singer had given up, the plan would have resulted in his safe arrest; he (Gunderson) had no viable alternative plan (ROA, Vol. LIX (59). Everyone else involved, however, testified that they perceived the plan of arrest as being reasonable under the circumstances, as calculated to avoid the involvement of the other members of the Singer family, and that it would succeed so long as John Singer was a rational person who would submit to an overwhelming show of force.

The Petition (at p. 12) further refers to some opinion testimony from persons purporting to be authorities in law enforcement procedures[4]. However, these "experts" were deposed at length and admitted to the following propositions:

> 1. That there is nothing unusual about confronting the subject of an arrest warrant with an overwhelming show of force in the expectation that, as a rational human being, he would submit to arrest.
>
> 2. That John Singer was rational, but the assumption that he would submit was a miscalculation on the part of the planning officers.

---

[4] The District Court properly disregarded the conclusory and argumentative opinions ventured by those purported experts through depositions and after-the-fact affidavits, 595 F. Supp. 292-293; Supp. App. p. 166. See also Rule 704, Federal Rules of Evidence, United States v. Milton, 555 F.2d 1198 (5th Cir., 1977), Frase v. Henry, 444 F.2d 1228 (10th Cir., 1971).

3. That no one could predict to a certainty whether or not Mr. Singer would shoot first, and to tell an arresting officer that he would not thus shoot would be irresponsible.

4. That the "experts" could, with the benefit of hindsight, devise plans which, in their opinions, would have had a better chance for the safe arrest of Mr. Singer, but that no plan could guarantee such a result.

5. That if Singer had not pulled a gun, but had submitted, he would have been safely arrested.

6. That no arrest plan could take all contingencies into account, and that the arrestee could always do something which might result in his injury or death.

7. That officer Jolley was justified in shooting Mr. Singer when Mr. Singer pulled a pistol and aimed it with the apparent ability and intent to shoot.

8. That there are probably as many plans of arrest as there are planners, and the one sure sign of a good plan is whether it succeeds.

9. That they saw no evidence of a conspiracy to ensure Singer's death.

10. The record further reflects that at least one of Petitioner's "experts" characterized the arrest plan as "good," 595 F. Supp. 293, Supp. App. p. 166; ROA, Vol. LXXII (72); Vol. LXXIII (73), Vol. LXXXIII (83).

D. Petitioner asserts that a question of fact exists as to whether John Singer even knew that the police officers were in fact officers, and thus whether he was justified in brandishing his pistol (Petition, pp. 7, 12). This is, perhaps, the most egregious of Petitioner's misstatements, as the Record clearly establishes the following:

(1) At the time of the arrest attempt the officers were wearing, variously, brown windbreakers and Highway Patrol jackets with patches on the shoulders, badges, hardhats with "Utah Highway Patrol" on the front of them with insignia, jackets with emblems and badges, and blue raid jackets with yellow-gold patches on each sleeve, and

badges or badge holders on the front. See District Court Opinion at 595 F. Supp. 232, 294 Supp. App. pp. 64-65, 166-168; ROA, Vol. XIV (14), p. 114, Vol. LXXXV (85), pp. 5-7, Vol. XIII (13), p. 41, Vol. LIV (54), pp. 98-99, Vol. VI (6), pp. 1681-1700, Vol. VII (7), pp. 1958, 1976.

(2) Prior to the fatal shot, various of the officers yelled out on several occasions that they were police, that John Singer was under arrest, and to drop his pistol. See District Court Opinion, 595 F. Supp. at p. 235; Supp. App. p. 70 (Agent Jolley yelling at decedent); p. 241, Id., Supp. App. p. 81 (Trooper Hayward heard several other officers yelling); p. 243, Id., Supp. App. p. 88 (Deputy Bates heard others yelling); p. 251, Id., Supp. App. p. 98 (Agent Gunderson and several other

officers were all shouting at decedent, on at least three or four occasions to "drop your gun, you're under arrest, police officers, etc."); p. 253, Id. Supp. App. p. 101 (Agent Jolley shouted similarly on three occasions).

(3) The Petitioner's family, by their own admission, knew that the men on the snowmobiles at the time of the arrest attempt were policemen.

Timothy Singer, age twelve at the time, testified that after he heard the shot, walked to the scene, and then back to the house:

> Q. You all knew that it was police officers again that had come?
>
> A. Yes, we did.
>
> Q. And there wasn't any question in your mind about that?
>
> A. That's right. (ROA, Vol. XXIII (23), pp. 37-39).

Charlotte Singer, age thirteen at the time, testified:

> Q. Were you aware that there were police officers watching the farm at that time?
>
> A. Yes.
>
> Q. How did you become aware of that?
>
> A. Well, we seen all these Ski-Doos [snowmobiles] riding all over around on the outside of our place, you know, and then we seen them have guns on the side of the Ski-Doos and we watched them with the binoculars and we knew what they were going to try to do. (Deposition of Charlotte Singer, ROA, Vol. XIX (19), pp. 59-60.)

Before the January arrest attempt, John Singer had himself told his brother, Harald, that he knew the house was under police surveillance (Deposition of Harald Singer, ROA, Vol. XLI (41), pp. 101-102, 272-273).

Petitioner Vickie Singer herself testified:

Q. There's no doubt in your mind that John knew the farm was under surveillance at the time, though?

A. I'm sure that he knew that it was under surveillance (ROA, Vol XX (20), p. 473).

* * *

Q. Mrs. Singer, you said that when you saw these people - this is before your husband was killed - you said you saw these people running around on snowmobiles, and you thought that they might very well be officers who were in some way trying to set up an arrest attempt.

A. Yes.

Q. And your husband also thought the same thing, didn't he?

A. Yes. (ROA, Vol. XXIV (24), pp. 651-652.)

In view of the foregoing admissions, the fact the Singers knew that the sheriff had been ordered to arrest Mr. Singer, and that an arrest had been attempted a few months before, the assertion that a factual question exists

simply because some of the officers also had "Police" written on the backs of their jackets is incredible. Clearly, the District Court was justified in concluding:

> Considering all of this evidence, there can be no issue of fact as to whether Mr. Singer knew them to be police officers. Given this fact and the officers' obvious authority to place Mr. Singer in custody, Mr. Singer had a duty to submit peaceably to arrest. 595 F. Supp. at 294, Supp. App. pp. 167-168.

E. Petitioner's other assertions, for example, that John Singer was shot twice square in the back, "dumped" into a pickup truck, and that the officers thereafter undertook a massive "coverup" are simply not borne out by the record, or require the exercise of sheer speculation and conjecture.

Petitioner's complaints, such as they are, relating to the "October attempt" also fail to state any facts

upon which an action may be maintained pursuant to 42 U.S.C. § 1983. The relevant facts relating to that attempt are set forth in the District Court's opinion at 595 F. Supp., pp. 220-227 (Supp. App. pp. 45-54) and the Court's legal analysis of those claims at pp. 288-290, Id. (Supp. App. pp 158-160).

II

THE PETITION DOES NOT IDENTIFY THE VIOLATION OF ANY ESTABLISHED CONSTITUTIONAL RIGHT

Petitioner has again failed to specify the deprivation of any recognized Constitutional right, but apparently seeks to excuse such failure by claiming that "the true dimensions of the constitutional issues cannot be measured until the case has matured through the orderly trial processes," a proposition clearly at odds with this Court's direction in Harlow v.

Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982), that insubstantial suits need not proceed to trial, but may be terminated by summary judgment.

Petitioner also claims that the constitutional questions are not apparent "since this case was dismissed in its infancy . . . before the constitutional question could raise its head from the birthing bed of a jury trial." First, it is clear that the case was not dismissed in its "infancy," as more than two years elapsed, seventy-plus depositions were concluded, and all desired discovery completed before the matter was submitted to the District Court for a ruling on the Motions for Summary Judgment. More importantly, however, the Petitioner at all stages has simply been unable to satisfy the threshold inquiry in any § 1983 action - whether

any established constitutional right has been violated, Baker v. McCollan, 443 U.S. 137 (1979).

The Petition does not clearly set forth what established constitutional rights were allegedly violated by the Respondents. However, the following seem to be the primary constitutional claims asserted: A violation of the First Amendment right to free exercise of religion in that Petitioners were not allowed to teach their children at home, and a Fourteenth Amendment due process violation, in that excessive force was contemplated in the planning of the January 1979 arrest attempt, and in the execution of the arrest.

As to the religious freedom claim, see 595 F. Supp. pp. 278-288, Supp. App. pp. 141-158; Respondents will not reiterate the District Court's sound reasoning in connection with that claim.

Suffice it to say that the foundation of the religious freedom claim must be that the Utah compulsory education statutes are unconstitutional as violative of the First Amendment. However, Petitioner conceded in the District Court that those statutes were not unconstitutional on their face (595 F. Supp. 282; Supp. App. p. 149) and again, conceded the point in her brief to the Tenth Circuit wherein, at page 44, Petitioner states:

> While plaintiffs do not admit the constitutionality of the Utah compulsory attendance law, for purposes of this appeal the constitutionality or unconstitutionality of that law need not be an issue . . . .

As to the claims relating to freedom from malicious prosecution, harassment, intimidation, outrage, and privacy, the District Court properly noted that the facts did not support any such claim, nor was there any constitutional right "to be free from any state regulation of

education or a right not to be prosecuted pursuant to valid state law," 595 F. Supp. at 285; Supp. App. p. 153.

The due process claim purports to relate to negligence in formulating the plan of arrest and excessive force in executing same. However, the facts were undisputed that the officers had valid court process authorizing the arrest of John Singer, that they were obviously law enforcement personnel, that nevertheless John Singer pulled a loaded pistol and pointed it at the officers, and was shot when Officer Jolley reasonably believed that his life was thus endangered. There is, simply, no constitutional right to resist lawful arrest through the brandishment of a loaded firearm.

By the same token, an arrest plan is not negligent "merely because it cannot avoid all risk of harm to the person to

be arrested, especially if he resists with a deadly weapon," 595 F. Supp. at 293, Supp. App. p. 166. Indeed, the cases which have considered similar claims have held that an arrestee has no right, Constitutional or otherwise, to a "risk-free plan of arrest," particularly where the arrestee elects to resist through the use of firearms. See, e.g., Maiorana v. McDonald, 596 F.2d 1072 (1st Cir., 1979), Standridge v. City of Seaside, 545 F. Supp. 1195 (N.D. Cal. 1982), Jordan v. Five Unnamed Police Officers, 528 F. Supp. 507 (D.C. La. 1981), and Amato v. United States, 549 F. Supp. 863 (D.C. N.J. 1982).

III

THE PETITION ASKS THIS COURT TO INDULGE IN A PRESUMPTION OF IRREGULARITY

Petitioner, in effect, asks this Court to indulge in a presumption of

irregularity, without evidence of same, and contrary to her own admission that the Record "appears regular." She further asks this Court to search the Record for a fact issue justifying the reversal of the Tenth Circuit Court of Appeals and of the District Court.

Petitioner seemingly contends, without evidence, that the result below was the product of (a) the abuses of an "interested judiciary," (b) concealment of the issues in a "massive" record and a lengthy District Court opinion, (c) a District Court Judge suffering from the "taint of self-interest," who was also a member of the fictional "Church-State conspiracy," and (d) a derelict Court of Appeals which, after two years of apparent agonizing over the matter, simply threw up its hands, joined the "conspiracy," and summarily affirmed.

Petitioner criticizes the District Court for authoring a lengthy analysis of the relevant facts and law, the same appearing, to her, too long. Petitioner is then critical of the Tenth Circuit because its opinion was, to her, too short, and that it took "two years to simply adopt Judge Winder's opinion."[5]

Petitioner cites no authority for the proposition that lengthy, or succinct, lower court opinions justify review by this Court; no such authority exists.

Petitioner also complains of the volume of the Record, implying that such was the result of a plot on the part of the defendants and the District Judge to

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5 It is true that the District Court Opinion was issued in September 1982, and the Circuit affirmed in September 1984. Peti- tioner neglects to point out that she did not favor the Circuit with her Reply Brief until February, 1984, nor the Appendix until June, 1984.

bury the facts and constitutional issues in a "massive," "formidable," record. Petitioner fails to point out that the bulk of the record consists of some seventy depositions, many of which were irrelevant, and that approximately half of the depositions were in fact taken by the Petitioner. Petitioner seems to claim, without authority or reason, that if enough depositions are taken, a meritless lawsuit may not be disposed of through summary judgment.

IV

NO VALID REASON IS SET FORTH WHY THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISIONS BELOW

Petitioner wishes this Court to "grant the Writ and to lay the burden squarely on Petitioner's shoulders to present in her brief the clearly documented evidence supporting the factual issues which entitle her to a trial"

(Petition p. 15). The Record, however, clearly reflects that Petitioner had ample opportunity to present to the District Court, and to the Court of Appeals, the same arguments now sought to be presented to this Court through the medium of a brief on the merits. However, Petitioner failed to establish the existence of any material fact issue or any viable constitutional claim in either of the lower courts, and no reason exists to allow Petitioner yet another opportunity to do what she has twice failed to do.

Petitioner, however, rhetorically inquires:

> Has not the existence of a conspiracy to deprive a citizen of his civil rights always been a matter for jury resolution, except when no substantial conspiratorial facts have been demonstrated in the record? (Petition, p. 11).

The short answer to Petitioner's question is, simply, "no." As the Tenth Circuit noted, a civil conspiracy is the combination of two or more persons acting in concert, either to commit an unlawful act, or to commit a lawful act by unlawful means, 745 F.2d at 609; App. pp. 5-6. In the instant case there is simply no evidence of either an unlawful purpose, or an unlawful method of achieving that purpose.

It cannot seriously be contended that the Respondents' agreeing to assist a Sheriff in executing valid arrest warrants could constitute the unlawful method of achieving a lawful purpose. Indeed, the service of the arrest warrants by law officers was the only method of achieving the purpose. Petitioner, however, then implies that the unlawful purpose was the execution of the "death plan," calculated to result

in the shooting of John Singer. Aside from the fact that there is no credible evidence to support such a contention, Petitioner herself has conceded that there was no such agreed-upon purpose. At page 42 of her Brief to the Tenth Circuit, Petitioner acknowledges:

> It is not to be suggested that these men plotted an assassination of Mr. Singer, but their purpose was so resolute that they were willing to accept his death as its likely consequence.

Unless being "resolute" (willing to accept the death of the arrestee in the event he resists with deadly force) constitutes an "unlawful purpose," the conspiracy claim fails. It is clear, however, that such resolve cannot constitute an unlawful purpose; otherwise, an "unlawful purpose" would exist every time law enforcement officials sought to arrest an individual who might elect to resist with deadly force. The District

Court and the Court of Appeals properly concluded that there was no evidence of a civil conspiracy.

Petitioner then poses the rhetorical question:

> . . . Has not the question of "excessive force" in arrest always been a jury question except in the clearest cases?

The answer to that is probably "yes." However, a case clearer than this is hard to imagine, in view of the fact that every witness to the shooting testified that John Singer was unlawfully resisting arrest through the threat of deadly force. Indeed, Petitioner's own expert witnesses testified that in their opinion Agent Jolley was justified in shooting.

Nor, as claimed by Petitioner, did the Tenth Circuit "abdicate" its duty to review, unless the Court of Appeals has a duty to needlessly reiterate that

already well-analyzed in the District Court's Memorandum Opinion. The Court of Appeals did, however, accurately summarize the operative facts and the relevant law, concluded that the Record supported the District Court's judgment, and adopted the reasoning of the District Court. Petitioner cites no authority for the proposition that the Court of Appeals' decision was contrary in any way to usual principles of appellate review.

Recognizing that Rule 17 of the Rules of the Supreme Court does not fully measure this Court's discretion in granting Writs of Certiorari, nevertheless there is no suggestion that any of the usual reasons for the granting of such a writ are here present. There is no indication that the Tenth Circuit rendered a decision in conflict with a decision of another Court of Appeals on

the same subject matter, nor that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Nor is there any claim that the Court of Appeals has "decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." To the contrary, the decisions of the District Court and the Court of Appeals are in full harmony with the controlling decisions of this Court.

What Petitioner truly seeks is yet one more opportunity to argue the merits of her perceived cause, already unsuccessfully presented to the Courts

below. Petitioner requests that this Court undertake the same task which Petitioner complains the Tenth Circuit did not undertake, to-wit: "To trek out into this wasteland of vague and distant horizons . . ." (Petition, p. 10). In effect, to search the Record, to analyze the facts, and to review what Petitioner claims is a conflict in the evidence - a task this Court has historically left to the lower Courts, General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, (1938); National Labor Relations Board v. Pittsburg Steamship Co., 340 U.S. 498 (1951).

CONCLUSION

For the reasons above stated, the Petition should be denied.

SNOW, CHRISTENSEN & MARTINEAU

By _____
David W. Slagle

By _____
Allan L. Larson